87-1794

NO:

in the

Supreme Court

of the

United States

April Term, 1988

WILLIAM KUANG TSAO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

WHETHER LAW ENFORCEMENT OFFICERS VIOLATED FOURTH AMENDMENT RIGHTS BY CONFRONTING AND DETAINING A TRAVELER, SEIZING HIS LUGGAGE FOR A "DOG SNIFF," AND REFUSING TO ALLOW THE TRAVELER TO SPEAK WITH HIS ATTORNEY, ALL WITHOUT REASONABLE ARTICULABLE SUSPICION

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OPINION BELOW

The unpublished Opinion of the United States Court of Appeals for the Ninth Circuit, No. 87-3024, is reprinted in the Appendix to this Petition at App. 1-30. The table citation is reported at 838 F.2d 475 (9th Cir. 1988).

JURISDICTION

The decision sought to be reviewed by Writ of Certiorari was rendered January 26, 1988. Rehearing and rehearing en banc were denied by an Order of the Ninth Circuit issued and filed March 23, 1988. App. 31. Title 28 U.S.C. § 1254(1) is the statutory provision which confers jurisdiction on this Court to review the decision in question, wherein Petitioner is the losing party.

STATEMENT OF THE CASE

On October 21, 1986, Petitioner and a companion, Debbie Fine, were travelling through Miami International Airport en route to Seattle, Washington. While neither Petitioner nor his companion fit the so-called "drug courier profile," they nonetheless aroused the attention of Metro-Dade (Miami) police officers because of Ms. Fine's "good looks." Ms. Fine was observed at the ticket counter apparently having trouble filling out a baggage tag (possibly because she was "high" or "sleepy").

From these observations alone, the officers began an investigation of Petitioner and Ms. Fine which uncovered

the following information:

1. Petitioner's ticket was issued to a "Michael Lee."

2. The two passengers had arrived from Seattle on October 18, 1986, were returning on October 21, and had paid over $2,000.00 for their round-trip tickets.

3. Detectives, claiming to be from United Airlines, telephoned the "call-back number" on the tickets and asked for "Michael Lee." A male answered the phone and replied that there was no one present by the name of "Michael Lee." Detectives then called again and a second male told detectives that "Michael-Lee" had been there but was no longer present.

Based upon the foregoing the Miami detectives elected to relay the information to the Port of Seattle (Washington) Police. The Seattle police ran the names of the passengers through

a police drug computer. One entry showed a Canadian warrant for a "Michael Robert Lee," alleging attempted importation of cocaine into Canada in May, 1986, and giving that subject's description.

Upon Petitioner's arrival in Seattle, detectives there observed that he "seemed nervous," apparently because he was "looking around" and "gaz[ing] and scan[ning] the faces of the other people waiting for baggage."

Petitioner and Ms. Fine had collected their luggage and were departing from the airport when the detectives approached. The three (3) detectives surrounded Petitioner and Ms. Fine and asked to speak with them. Petitioner consented. However, the detectives did testify at the Motion to Suppress

hearing that they were prepared to arrest Petitioner had he refused to cooperate.

Upon request, Petitioner produced his driver's license which was issued in his given name, William Tsao. The detectives did not return Petitioner's license. The driver's license listed a description completely dissimilar to that of "Michael Robert Lee," as was apparent from Petitioner's physical appearance.

Petitioner then produced his plane ticket, upon request, and the detectives questioned why the name on the ticket was different from his driver's license. The detectives did not return Petitioner's ticket. When Petitioner asked what was wrong, the detectives informed him that he was the subject of a narcotics investigation and

then requested to search Petitioner's luggage. At this time, Petitioner specifically requested to speak with his attorney. Although phones were nearby, the detectives told Petitioner that he would have to go to a holding cell to place the call. The detectives then took Petitioner's baggage to an area of the airport where a drug-sniffing dog was waiting. The dog "alerted" to one of the pieces of luggage. Petitioner was taken to a holding cell. After conferring by telephone with his attorney, Petitioner was arrested and taken into custody. A subsequent search of his person revealed a small amount of cocaine.

On the following day, the detectives sought and received a search warrant for Petitioner's luggage. The

search warrant affidavit contained several misrepresentations and false statements concerning Petitioner's use of the name "Michael Robert Lee," and completely omitted the fact that the detectives knew from Petitioner's description and fingerprints that he was not "Lee." Pursuant to this warrant, the luggage was searched and found to contain two (2) kilograms of cocaine. Petitioner's motion to suppress was denied and the cocaine introduced at trial formed the basis for the conviction.

REASONS FOR GRANTING THE WRIT

LAW ENFORCEMENT OFFICERS VIOLATED FOURTH AMENDMENT RIGHTS BY CONFRONTING AND DETAINING A TRAVELER, SEIZING HIS LUGGAGE FOR A "DOG SNIFF," AND REFUSING TO ALLOW THE TRAVELER TO SPEAK WITH HIS ATTORNEY, ALL WITHOUT REASONABLE ARTICULABLE SUSPICION

A. The Ninth Circuit's Holding That Petitioner Was Not Seized During The Initial Encounter With Police Was Clearly Erroneous

The Ninth Circuit ignored several pertinent and controlling facts in determining that Petitioner was not seized for Fourth Amendment purposes. The Court determined that the examination of Petitioner's driver's license and plane ticket was not in and of itself enough to constitute a Fourth Amendment seizure. However, the Court

failed to consider that not only were the driver's license and plane ticket examined by the detectives, but they were actually retained by the law enforcement authorities. Further, when Petitioner sought to speak with his attorney from the nearby telephones, the detectives refused to allow this requested communication. Petitioner was told that he would have to wait until he was taken to a holding cell to place this call. Although Petitioner had gathered his luggage for departure, detectives seized the luggage and took it to a holding area. The luggage was then "sniffed" by a narcotics detection dog.

These circumstances clearly amount to a show of official authority such that "a reasonable person would

have believed that he was not free to leave." Florida v. Royer, 460 U.S. 491, 503, 103 S.Ct. 1319, 1326 (1983) (citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980)). The detectives held Petitioner's personal effects (plane ticket, driver's license, and luggage). The detectives denied Petitioner the freedom to call his attorney from the nearby phones, and they later testified that he would have been arrested had he attempted to leave. The Petitioner also testified that he did not believe that he was free to leave. Inexplicably, however, the Ninth Circuit held that the Petitioner was not seized for Fourth Amendment purposes. Such a conclusion was "clearly erroneous" and this Honorable Court should

accept jurisdiction to restore Petitioner's constitutional rights.

B. The Ninth Circuit's Decision Is In Conflict With The Decision Of Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983).

In Royer, another "airport stop" case, this Court held that:

> [A]sking for and examining Royer's tickets and his driver's license were no doubt permissible in and of themselves, but when the officers identified themselves as narcotics agents and told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any other way that he was free to depart, Royer was effectively seized for purposes of the Fourth Amendment.
>
> Royer, 460 U.S. at 501, 103 S.Ct. at 1326.

The circumstances of Royer are virtually indistinguishable from those instanter. In fact, the Petitioner actually aroused less "reasonable articulable suspicion" to justify the stop and seizure than did the defendant in Royer. Royer initially attracted police attention because he fit "the so-called drug courier profile." Royer, 460 U.S. at 493, 103 S.Ct. at 1322. In sharp contrast, Petitioner initially attracted police attention merely because he was accompanied by an attractive woman. Further, Royer paid cash for his plane tickets while Petitioner did not. The only similarity between Petitioner and Royer was the fact that both were travelling under an assumed name. Yet the Ninth Circuit

determined that there was enough "reasonable articulable suspicion" to detain Petitioner and seize his luggage. Although the detention sub judice was indistinguishable from that in Royer, the Ninth Circuit held that Petitioner was not seized for Fourth Amendment purposes.

The Ninth Circuit's opinion in this case is clearly in conflict with Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983). Accordingly, this case should be reviewed by this Honorable Court in order to resolve this conflict and restore Petitioner's constitutional rights.

CONCLUSION

Petitioner has been denied basic fundamental rights guaranteed by the United States Constitution and seeks relief in this Court to restore those rights. Based on the arguments and authorities cited herein, Petitioner, William Kuang Tsao, respectfully requests this Honorable Court to grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and reverse that Court's decision.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 87-3024
v.	)	
WILLIAM KUANG TSAO,	)	D.C. No.CR-86-304-JCC
Defendant-Appellant.	)	MEMORANDUM*

Appeal from the United States District Court for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued December 7, 1987
Submitted December 11, 1987
Seattle, Washington

Filed January 26, 1988

Before: WRIGHT, ANDERSON, AND SCHROEDER, Circuit Judges.

Tsao was charged with possession of cocaine with intent to distribute in

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. Rule 36-3.

violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). At trial, Tsao moved to suppress the introduction of items seized in the search of his person and a search of his luggage on the ground that the searches and seizures violated the Fourth Amendment to the United States Constitution. The district court denied Tsao's motion. He was convicted after a trial in which it was stipulated that the trial judge could consider all of the evidence adduced during the suppression hearing.

We have jurisdiction under 28 U.S.C. § 1291. We affirm the conviction.

There are mainly two issues before us. First, whether the district court erred when it concluded that Tsao's fourth amendment rights were not violated. Second, whether the district court erred when it denied Tsao's motion to continue for substitution of counsel.

I. FACTS

On October 21, 1986, at Miami International Airport, law enforcement officers noticed Tsao and his companion, Debbie Fine, approach the United Airlines ticket counter. They were initially noticed because of their apparent "good looks." The law enforcement officers noticed that Ms. Fine had difficulty filling out her baggage tag. They thought she might be high, intoxicated or possibly sleepy. The detectives learned that Tsao, who was using the name "Mike Lee," and Ms. Fine had flown from Seattle to Miami on October 18th, were scheduled to return on the 20th, but now sought to return to Seattle on October 21st. They had spent more than $2000.00 on round-trip airline tickets.

The Miami officers did not have sufficient time to conduct an extensive investigation before the flight left for Seattle. The officers, however, did follow up on several leads immediately thereafter. Officer Wolfe checked the call-back number given by "Mike Lee" in making his reservations. The initial response to Officer Wolfe's call was that there was no one by the name of Michael Lee at that location. Wolfe then claimed that she was from United Airlines. A second male got on the phone and told her that Michael Lee had been there, he wasn't there any longer, and that maybe he had caught another plane.

The Miami law enforcement officers decided to relay a summary of their observations to Detective Watts of the Port of Seattle police. Detective Jensen of the Port of Seattle police ran

the names Debbie Fine and Michael Lee through a police drug computer. The computer disclosed no information as to Ms. Fine. Similarly, a computer check of Michael Lee's Miami call-back number disclosed nothing suspicious.

The computer did disclose entries regarding various Michael Lees. One entry showed a Canadian warrant for a "Michael Robert Lee," alleging attempted importation of cocaine into Canada at the British Columbia border in May of 1986.

On October 22, 1986, at mid-day, Detective Watts observed Ms. Fine and Tsao deplane from their flight. The flight was a day late getting into Seattle because of adverse weather conditions. They walked to a tram car, and traveled to the baggage claim area. According to Detective Watts, the defendant "seemed nervous," apparently because he "was looking around."

After Tsao had collected all of the checked baggage, Detective Watts and two other plain-clothes officers approached Tsao and Ms. Fine. Detective Watts displayed his police identification and identified himself as an investigator working for the DEA task force at the airport. He asked Tsao if he could speak with him and the defendant stated "sure." Watts told Tsao to produce his identification. Ms. Fine was also told to produce her identification. The defendant and Ms. Fine then were split up by the detectives.

After Tsao displayed his driver's license, the license was taken by Detective Watts and given to Detective Hilliard to review. Watts noted that the description of Tsao on the license did not match that of the "Michael Robert Lee" wanted in Canada.

Detective Watts then asked Tsao to produce his airline tickets. When he displayed them, Watts took the tickets. Detective Watts maintained control over the ticket and the driver's license from then on. Detective Watts noted that the name on the ticket was Michael Lee. The defendant was asked whether he was "Michael Robert Lee" and he replied "no."

Upon obtaining the driver's license and airline ticket, Detective Watts believed that he was dealing with the defendant, William Tsao, not Mr. Lee. Detective Watts asked Tsao why he was traveling under the name of Michael Lee, and Tsao asked him what the problem was. When asked by Watts whether he would consent to a search of his bag, Tsao replied that he first wanted to talk to his attorney. Although telephones were available in the baggage claim area, the police

decided they would take Tsao to the "holding cell" to make the call from there.

Meanwhile, Debbie Fine consented to a search of her bags. No contraband was discovered. She was then allowed to leave.

Detective Jensen took Tsao's luggage from the cart to the baggage make-up area of the airport, where the luggage was presented to a dog for sniffing for drug odors. Jensen was advised by the handler that the dog "alerted" to one of the pieces of luggage. He gathered up the luggage and returned to the corner by the elevator where Detectives Watts and Hilliard remained with Tsao. From the time the detectives frst had contact with Tsao and Ms. Fine until the dog alert was accomplished, only about five or six minutes elapsed.

Detective Watts advised Tsao about the dog alert and again sought his consent to search the luggage. Tsao stated that he first wished to talk with his attorney. Watts told Tsao that was fine and that they could go up to the office so that the defendant could use the telephone. During this encounter, the officers displayed no weapons or handcuffs and employed no show of force.

Mr. Tsao asked if he was under arrest and he was told "[n]o, not at this time." The defendant then accompanied Detective Watts upstairs to the Port of Seattle police office. While Tsao was conferring with his attorney, Detectives Watts and Jensen determined that there was probable cause to arrest Tsao. That determination was made after Tsao completed the call to his attorney. Incident to arrest, Tsao was asked to empty his pock-

ets. At this time, Tsao failed to disclose a bindle of cocaine which was discovered on his person during a more thorough search.

Tsao felt that he was not free to leave the presence of the officers from the time they took his driver's license and ticket. He testified that:

> They had taken my identification, had taken my plane tickets and itinerary, had taken my luggage, and were standing in such a manner as to indicate that I wasn't to leave. It was apparent to me that, well, obviously they wanted to have something to do with me then and I wasn't to go anywhere at that time.

Later, on October 22, Detective Watts with the help of an Assistant U.S. Attorney prepared an affidavit in support of a search warrant for Tsao's luggage. The affidavit, which was sworn to by Detective Jensen, was presented to a U.S. Magistrate who issued a search warrant.

The police discovered two kilograms of cocaine in Tsao's luggage. Tsao contends that the affidavit contains several false statements, material misrepresentations, and/or omissions that will be discussed later.

At the suppression hearing, Detective Mike Autochovich, the dog handler also testified about the facts surrounding the alert as well as the dog's training record. Through Autochovich, the Government offered in evidence the certificate that the dog, Hunter, and the handler had completed the U.S. Customs Service Narcotics Detection Course as well as the dog's training records for the month of October 1986.

On cross-examination, the defense established that three days before the dog alert on Mr. Tsao's luggage, the same dog had difficulty during another

exercise, and had failed to alert on some heroin on October 16. In two of the actual search situations where the dog failed to alert, there was no evidence that drugs were present in the items which were the subject of the dog sniff. All of the exercises or actual exmainations by Hunter demonstrated reliability according to the dog handler.

The defendant testified at the suppression hearing and stated that he produced a valid license and his airline ticket at the request of the police at Sea-Tac Airport, and that from the time of the initial approach onward he did not feel free to leave the area.

The court denied the motion to suppress and announced certain findings at the conclusion of the hearing. Among other things, the court focused on the fact that Tsao had surrendered an expired

license while maintaining custody of his valid Washington State license and the fact that his flight had ended in Seattle, thus his tickets were no longer of any use. The court observed that such factors militated against a finding that a reasonable person under such circumstances would believe he was not free to break off the encounter with the police.

In addition to the suppression hearing testimony, at trial the United States offered the testimony of Detective Watts through whom the government introduced evidence obtained from Tsao including his airline tickets, a copy of the travel agency itinerary in the names of Michael Lee and Debbie Fine, and the key to his luggage and the cocaine concealed therein.

Debbie Fine also testified that she agreed to accompany the defendant to

Miami in October of 1986. Ms. Fine stated that the Defendant met with an individual named George to whom the defendant gave a number of hundred dollar bills and on the flight from Miami Tsao acted in a [sic] unusual manner. When Ms. Fine made an inquiry, Tsao told her he had a lot on his mind and that she really did not want to know about it.

Detective Mark Hilliard testified that he seized a small quantity of cocaine from the defendant's person at the time of his arrest. The government also established that the defendant's fingerprint was found on a plastic bag located inside the cardboard box which contained the cocaine.

Andrew Allen, a DEA Chemist testified that the two packages of powder from the defendant's luggage containted 1,035 grams of 92% cocaine, and 1,042

grams of 98% cocaine. Finally, Allen identified the substance found on Tsao's person as cocaine.

II. DISCUSSION

This court reviews the district court's determination as to whether a seizure occurred de novo. United States v. Sokolow, 831 F.2d 1413, 1416 (9th Cir. 1987). Findings of fact upon which the district court based its conclusion are reviewable under the clearly erroneous standard. United States v. Fouche, 776 F.2d 1398, 1402 (9th Cir. 1985); United States v. McConney, 728 F.2d 1195, 1200-1201 (9th Cir.) (en banc), cert. denied, 105 S.Ct. 101 (1984).

Tsao argues that he was seized for fourth amendment purposes when he was approached in the airport in a corner area near the elevator. In determining whether

a person has been "seized" within the meaning of the fourth amendment, after viewing all of the surrounding circumstances, a violation will have occurred only if a reasonable person would have believed that he was not free to leave. United States v. Mendenhall, 446 U.S. 544, 554 (1980). The district court, however, determined that no seizure for fourth amendment purposes had occurred at this time.

On the facts of this case, no "seizure" of Tsao occurred. The stop took place in a public area, and the officers, who were not in uniform, displayed no force. Although requesting an individual to furnish identification might be taken as a sign of authority, see United States v. Patino, 649 F.2d 724, 727 (9th Cir. 1981), the district court determined that in this case it was not.

In resolving this issue, we are guided by the Supreme Court which has ruled that the police do not need probable cause to stop a person for questioning. As the Supreme Court noted in Terry v. Ohio, 392 U.S. 1 (1968), not every encounter between law enforcement and a citizen is a fourth amendment seizure. Further, while a "forcible stop" must be supported by reasonable suspicion of criminal activity, no such requirement attaches to a voluntary encounter between a police officer and a citizen.

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street, or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offer-

> ing in evidence in a criminal prosecution his voluntary answers to such questions.

Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion). See also Patino, 649 F.2d at 727. The Supreme Court has also noted that asking for and examining a traveler's plane ticket and driver's license, in themselves, do not constitute a seizure. Florida v. Royer, 460 U.S. at 501.

When Detective Watts first approached Tsao, he asked Tsao if he could speak with him. Tsao stated, "sure." Thus the encounter was, at first, consensual. In absence of evidence of inoffensive contact between Tsao and the officers, we find that no seizure of Tsao's person occurred at the airport elevator for fourth amendment purposes because Tsao was free to leave at any time.

This stop ripened into a Terry detention when Watts asked Tsao's permis-

sion to search his luggage. A Terry-type stop is justified only if there exists reasonable and articulable suspicion, based on objective facts, that the individual is involved in criminal activity. Brown v. Texas, 443 U.S. 47, 51 (1979).

The officers knew at this point that Tsao was traveling under an assumed name due to the discrepancy between the names on his ticket and driver's license. Combined with the other facts known to the officers, this constitutued [sic] reasonable suspicion for temporarily detaining him.

The next issue to be addressed is whether the police had reasonable and articulable suspicion of criminal activity to justify their seizure and/or detention of Tsao's luggage.

Tsao argues that the court relied upon the same circumstances that justified his detention in order to justify

the seizure of his luggage. In addition Tsao contends that there was no showing whatsoever that the luggage contained drugs and therefore that the seizure of his luggage for a sniff-test violated his fourth amendment rights. Based upon the circumstances already discussed, however, police had a basis for their suspicion that Tsao was transporting cocaine. Furthermore, subjecting Tsao's luggage to a test by a dog trained to sniff narcotics is not a search within the meaning of the fourth amendment. See United States v. Place, 462 U.S. 696, 707 (1983); United States v. Beale, 736 F.2d 1289, 1291 (9th Cir.), cert. denied, 105 S.Ct. 565 (1984). Considering the short time Tsao spent in the agents' presence, the very short period of time during which the luggage was detained for narcotics detection, and the limited scope of the investigation, together with the other circumstances al-

ready discussed, the district court's finding that agents had grounds for reasonable suspicion to detain Tsao's luggage is affirmed.

Tsao argues that his arrest and the search of his person violated his fourth amendment rights since his arrest was based on his prior illegal detention, the illegal detention of the luggage, and the ensuing dog sniff. Because the arrest and search of his person were the fruit of these illegalities, Tsao contends that they were invalid. Sokolow, supra.

Since we find that Tsao's seizure was supported by reasonable suspicion and that the seizure of his luggage and the ensuing sniff-test were justified, this argument is without merit. After Tsao's valid arrest, the police were justified in conducting a warrantless search of his person incident to the arrest. United States v. Robinson, 414 U.S. 218,

235 (1973). That search produced a small amount of cocaine.

Whether the search warrant for Tsao's luggage was supported by probable cause must be considered by this court. Tsao contends that the affidavit used to obtain the search warrant contained deliberate or reckless omissions of facts that tend to mislead.

In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court identified the limited circumstances in which a defendant is entitled to an evidentiary hearing to challenge the veracity of statements in an affidavit. A defendant is entitled to such a hearing if he offers substantial proof that the affiant's statement was deliberately false or demonstrated reckless disregard for the truth. Allegations of innocent mistakes or even negligence do not warrant an evidentiary

hearing. Finally, the defendant must establish that the challenged statement was essential to the magistrate's finding of probable cause. Id. at 171-172; United States v. Foster, 771 F.2d 871, 879 (1983). The trial court considered Tsao's Franks challenge but found no deliberately false statements or statements made with a reckless disregard for the truth. At most, the court determined that a mistake had been made. Thus Tsao's Franks' challenge was denied.

We agree with the district court. A search warrant will not be set aside and the fruits of the search suppressed unless the defendant's contention is established by a preponderance of the evidence, and, after deletion of the false material, the affidavit is insufficient to establish probable cause. Franks, 438 U.S. at 155-56.

Here, the inclusion of "Michael Robert Lee" as the name on the airline ticket instead of "Michael Lee" was not prejudicial. If the middle name were deleted, the affidavit would remain sufficient. As far as the allegations regarding the reliability of the dog are concerned, Tsao did not establish by a preponderance of evidence that the statements were false or made in a reckless disregard for the truth. Also, when Jensen indicated that Tsao was placed under arrest, searched, and a small amount of cocaine was recovered, he did not state that he personally conducted the search. Rather, he just reported the results of the search. We do not find the failure to state that Detective Hilliard conducted the search to be deliberate or of reckless disregard. As the district court stated, "[a]ll that has been shown is that a mis-

take was made."

Based upon the foregoing, we find that the police conduct on October 22, 1986, was lawful and that the affidavit for the search warrant sufficiently established the existence of probable cause which justified the issuance of the search warrant. All evidence gathered against Tsao was lawfully obtained. We affirm the district court's judgment finding that Tsao's fourth amendment rights were not violated.

The final issue in this appeal is whether Tsao was denied his sixth amendment right to counsel when the trial court denied his motion for continuance.

At his initial appearance, Tsao was represented by retained counsel, John Muenster. After the defense requested a continuance on the initial arraignment, Tsao was once again represented by Mr.

Muenster when he entered his not guilty plea. Counsel for Tsao filed a motion to continue the trial date, citing a need to conduct extensive research on a motion to suppress. This motion was granted. A motion to suppress was filed. Throughout these proceedings, Tsao was represented by Mr. Muenster.

At the request of Mr. Muenster the hearing on the motion to suppress was continued on the grounds that Joel Hirshorn [sic], a Miami attorney retained by Tsao as co-counsel, was unavailable. The court granted the request, but underscored its congested court calendar making further continuances unlikely, if not impossible.

On January 7, 1987, five days before the trial was scheduled to begin, Mr. Muenster filed a new motion to continue the trial based on Mr. Hirshorn's [sic]

legitimate conflict with a trial in the Southern District of Illinois. On this date, Mr. Hirshorn's [sic] notice of appearance was finally filed in the Washington district court. Throughout the proceedings, Mr. Muenster had appeared for Tsao, not simply as local counsel, but as Tsao's attorney of record. The district court denied this motion to continue.

"It is settled law that under the Sixth Amendment criminal defendants 'who can afford to retain counsel have a qualified right to obtain counsel of their choice.'" United States v. Washington, 782 F.2d 807, 811 (9th Cir. 1986) (quoting United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984)). While this right is "qualified," it only gives way "where its vindication would create a serious risk of undermining public confidence in the in-

tegrity of our legal system." Washington, 782 F.2d at 811.

In United States v. Pederson, 784 F.2d 1462 (9th Cir. 1986), the court was faced with an appellant's claim that his sixth amendment right to counsel was violated because the court refused to grant a long enough continuance for replacement lead counsel to prepare the case. The court decided that a two-day continuance was sufficient because new lead counsel was already somewhat familiar with the case, arrived to confer with the defendant one day before the trial, had the benefit of conferring with and the assistance of local counsel, and because complex factual or legal issues were not present. Based on these factors, the Ninth Circuit found no abuse of discretion in the district court's refusal to grant a continuance of greater than two days.

In Morris v. Slappy, 461 U.S. 1 (1983), the Supreme Court found that the defendant's request for a continuance based on his desire to have an original counsel who became ill during trial appear in his case because of substitute counsel's inadequate trial preparation was properly denied when substitute counsel acknowledged that he was prepared to proceed to trial. In holding that the trial court did not abuse its discretion in denying the continuance, the Supreme Court reaffirmed the principle set forth in Ungar v. Sarafite, 376 U.S. 575 (1964), that "... an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." Morris, 103 S.Ct. at 1616.

Considering the circumstances, we determine that the denial was neither

unreasonable nor arbitrary. Tsao had the benefit of representation by counsel of his choice in that he retained Mr. Muenster to represent him. Mr. Muenster had represented him throughout all of his appearances and was the attorney of record. Furthermore, when the continuance was requested, Mr. Muenster indicated that he was prepared to proceed to trial. Under these circumstances, the district court did not abuse its discretion in denying the motion for continuance.

Appellant's conviction is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 87-3024
v.	)	D.C. No. CR-86-304-JCC
WILLIAM KUANG TSAO, Defendant-Appellant.	)	ORDER

Before: WRIGHT, ANDERSON, AND SCHROEDER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

(2)

No. 87-1794

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM KUANG TSAO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's detention at the Seattle airport was supported by reasonable suspicion that he was engaged in narcotics trafficking.

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Cases:

Constitution and statute:

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OCTOBER TERM, 1988

No. 87-1794

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1988. A petition for rehearing was denied on March 23, 1988. The petition for a writ of certiorari was filed on April 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Washington, petitioner was convicted of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to 10 years' imprisonment, to be followed by a five-year special parole term. The court of appeals affirmed.

1. On October 21, 1986, officers patrolling the Miami International Airport saw petitioner and his companion, Debbie Fine, approach the United Airlines ticket counter. Both were casually dressed; petitioner wore a great deal of gold jewelry and a gold, diamond-studded Rolex watch. As the couple checked three of their four suitcases, the officers noticed that Fine appeared to be under the influence of narcotics and was having difficulty filling out the luggage tags. Tr. 22-24, 41-42, 52, 60.[1]

After petitioner and Fine left the counter, the officers learned from the ticket agent that petitioner was flying under the name "Mike Lee"; that he and Fine had flown to Miami from Seattle on October 18 after having made their reservations the previous day; that they were initially scheduled to return to Seattle via Denver on October 20; and that their first-class tickets cost more than $2400. Petitioner left a callback number with the airline, and the telephone at that residence had been installed only that month.[2] When one of the officers called that number, a person with an Hispanic accent answered the telephone and stated that there was no one named "Mike Lee" at that location. When the officer said that she was from the airline, a second person took the phone and stated that Lee had been there and had left; after speculating that Lee had caught another plane, that person hung up abruptly. The Miami police officers relayed that information to officers

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[1] "Tr." refers to the transcript of the hearing on petitioner's motion to suppress evidence.

[2] Miami Police Officer Jody Wolfe testified that the date of installation was significant because narcotics dealers change their addresses and phone numbers frequently. Tr. 44-45.

in Seattle. The Seattle officers ran a computer check on the names "Debbie Fine" and "Michael Lee." They found nothing on Fine, but found an outstanding Canadian warrant for the arrest of "Michael Robert Lee" on a charge of attempted importation of cocaine into Canada. When the officers attempted to verify the Washington address that petitioner had given the airline, they found that the address corresponded to a building with private "mail stops" or mail boxes, rather than a dwelling. Tr. 24-29, 32-48, 52, 56-66, 136-138, 151-153.

After a one-day delay in Denver due to bad weather, petitioner and Fine arrived in Seattle on October 22, four days after they had left. As they rode a tram to the baggage claim area, petitioner appeared nervous and "was looking around." After petitioner had collected the baggage, Seattle Detective Gregory Watts approached petitioner, identified himself, and asked to speak with him. Petitioner agreed (Tr. 70; Pet. App. 5-6). Upon a request for identification, petitioner gave Watts an expired driver's license bearing the name "William Tsao." After examining the license, the officer concluded that petitioner was not the individual named in the Canadian warrant. Detective Watts then asked to see petitioner's airline ticket. After petitioner handed the ticket to the detective, Watts saw that it had been purchased in the name "Michael Lee." Detective Watts then asked petitioner if he was "Michael Robert Lee." Petitioner replied that he was not. When the officer asked why he was traveling under the name "Michael Lee," petitioner replied, "What seems to be the problem?" (Tr. 71). Detective Watts asked petitioner if he would consent to a search of his luggage, and petitioner replied that he wanted to speak to an attorney first. Tr. 66-74, 136-143.

Meanwhile, another officer had moved petitioner's luggage to another area within the airport. There, the officer

had the luggage examined by a narcotics detection dog, and the dog alerted to one of the bags. At that point, approximately 15 minutes had elapsed since the initial contact with petitioner, and five minutes since the bags were removed for examination by the dog. After the officers advised petitioner of the results of the examination, petitioner again said that he wanted to speak to an attorney. Petitioner was then escorted to an office within the terminal, where he was permitted to call a lawyer. As petitioner was making his call, the officers conferred and decided that they had probable cause to arrest him. At the conclusion of petitioner's call, the officers arrested petitioner, searched him, and found a bindle of cocaine on his person. Thereafter, the officers obtained a search warrant for petitioner's suitcase. A search of the suitcase revealed two kilograms of cocaine. Tr. 74-82, 143-147, 170-172.

2. The district court denied petitioner's motion to suppress the cocaine as the fruit of an illegal detention (Tr. 259). The court held that the initial encounter between petitioner and the Seattle officers was consensual. In addition, the court held that the fact that the officers retained petitioner's expired license and cancelled ticket did not transform the encounter into a seizure, because petitioner's trip was completed and the license was no longer valid. The retention of those documents therefore did not impede petitioner in the event that he wanted to leave. In any event, the court found that the agents had ample justification for a *Terry* stop. Tr. 127-132, 255-256, 265-273.

3. The court of appeals affirmed. Pet. App. 1-30. It held that the initial contact between petitioner and the officers at the Seattle airport was consensual. *Id.* at 15-18. The encounter did not ripen into a *Terry* stop, the court held, until the officers asked petitioner for consent to search his luggage. By that time, however, the officers had

reasonable suspicion that petitioner was in possession of narcotics, which justified the brief detention of petitioner's luggage for examination by a narcotics detection dog. *Id.* at 19-21. Once the dog alerted, the officers had probable cause to arrest petitioner, the court held, and the officers could therefore search him incident to his arrest. *Id.* at 21.[3]

ARGUMENT

Petitioner argues that he was seized when Detective Watts approached him at the Seattle Airport and that his seizure was not supported by reasonable suspicion.

The initial encounter between petitioner and the Seattle officers did not amount to a seizure under the Fourth Amendment. Without physically restraining petitioner or displaying a weapon, Detective Watts asked petitioner for permission to speak to him, and petitioner agreed. Detective Watts then asked petitioner for some identification and his airline ticket, and petitioner handed the detective an expired driver's license and his cancelled airline ticket. That type of consensual police-citizen encounter does not amount to a "seizure" under the Fourth Amendment. *INS* v. *Delgado,* 466 U.S. 210, 216-217, 219-221 (1984); *Florida* v. *Royer,* 460 U.S. 491, 497, 501 (1983) (plurality opinion); *United States* v. *Mendenhall,* 446 U.S. 544, 553-556 (1980) (opinion of Stewart, J.); see *Michigan* v. *Chesternut,* No. 86-1824 (June 13, 1988), slip op. 5-8; *Terry* v. *Ohio,* 392 U.S. 1, 19 n.16 (1968).

Petitioner does not disagree. Rather, he contends (Pet. 10) that he was seized when Detective Watts did not return

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[3] The court also upheld the warrant-authorized search of petitioner's luggage. The court rejected his claim that the supporting affidavit contained material factual misrepresentations. Pet. App. 22-25.

his airline ticket and driver's license after examining them, when he was not immediately allowed to use a nearby telephone to contact a lawyer, and when his luggage was briefly held so that it could be examined by a narcotics detection dog.[4] By that time, however, the officers had reasonable suspicion that petitioner may have been involved in narcotics trafficking.

The officers knew the following facts by the time they moved petitioner's luggage from the cart so that it could be examined by a narcotics detection dog: (1) petitioner had spent more than $2400 on round-trip tickets from Seattle to Miami, a major source city for narcotics; (2) petitioner and his companion had stayed in Miami only two days, even though the round trip between Seattle and Miami is about 6000 miles; (3) petitioner's companion appeared to be under the influence of narcotics when she was filling out the baggage claim tickets; (4) petitioner was not known by the first person who answered the telephone at the callback number that petitioner had given the airline, and the reply given by the second person who answered the call was suspicious; and (5) petitioner was traveling under an assumed name, he offered no explanation for doing so, and he nervously looked around the Seattle terminal after he had deplaned.

This Court and the courts of appeals have recognized that factors such as those are indicative of narcotics trafficking. See, *e.g.*, *Florida* v. *Royer,* 460 U.S. at 502 (plurality opinion); *United States* v. *Mendenhall,* 446 U.S.

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[4] Petitioner points out (Pet. 5-6, 11) that the officers would have arrested petitioner had he attempted to leave the airport at that point. That fact is immaterial, however, because petitioner did not attempt to leave, the officers did not arrest him at that point, and they did not communicate their intentions to him. Accordingly, the officers' intentions did not transform their investigative detention into a full-scale arrest. See *Michigan* v. *Chesternut,* slip op. 7 n.7.

at 564-565 (opinion of Powell, J.); *United States* v. *Whitehead,* No. 87-5093 (4th Cir. May 24, 1988), slip op. 20; *United States* v. *Hanson,* 801 F.2d 757, 761-763 (5th Cir. 1986); *United States* v. *Ilazi,* 730 F.2d 1120, 1124 (8th Cir. 1984). An experienced narcotics officer viewing the whole picture (see *United States* v. *Cortez,* 449 U.S. 411, 417 (1981)) could reasonably infer from those facts that petitioner was bringing narcotics back to Seattle from Miami. Accordingly, the Seattle police officers had sufficient grounds for briefly detaining petitioner's luggage so that it could be examined by the narcotics detection dog. Once the dog alerted to the presence of narcotics, the officers had probable cause to arrest petitioner and to search his person. See *United States* v. *Robinson,* 414 U.S. 218 (1973).

Although we believe that the court of appeals' ruling was correct, this Court may nonetheless wish to hold this case pending its decision in *United States* v. *Sokolow,* cert. granted, No. 87-1295 (June 6, 1988). In that case, the Ninth Circuit adopted a new two-part test for determining reasonable suspicion in the airport context. That test requires that before a law enforcement officer may make a *Terry* stop of a suspected drug courier traveling through an airport, the officer must be able to point to direct evidence that the suspect is involved in narcotics trafficking, and the officer must be able to supply empirical or statistical proof that the circumstantial evidence on which he relies does not also characterize a large number of innocent travelers. Some of the facts in this case are similar to those in *Sokolow,*[5] but there also are some differences.

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[5] Both Sokolow and petitioner were young; they both made brief round trips over long distances to Miami; each suspect paid more than $2000 for a pair of round-trip tickets, which were purchased on short notice; in each case, the officers had reason to believe that the suspect

For example, there was an obvious discrepancy between the name petitioner used for his airline ticket and the name on petitioner's expired driver's license. That fact appears to be the type of direct proof of narcotics smuggling that the Ninth Circuit found critical to the reasonable suspicion determination in *Sokolow*. Accordingly, the judgment in this case may survive even if this Court in *Sokolow* were to endorse the Ninth Circuit's two-part reasonable suspicion test. That is particularly true in light of the fact that the decision below was handed down by the Ninth Circuit, which decided *Sokokow*, and the fact that the court of appeals even cited its earlier decision in *Sokolow* in the court's unpublished opinion in this case. Pet. App. 15, 21. Nevertheless, this Court's decision in *Sokolow* could potentially affect the disposition of this case. We therefore do not oppose holding the petition in this case pending the decision in *Sokolow*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Sokolow*, cert. granted, No. 87-1295 (June 6, 1988), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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was traveling under a false name; and both men nervously looked around the airport terminal.

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